Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

CHARLES A. PRATT CONSTRUCTION CO., INC.,
Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal, Second Appellate Dist., Div. 6

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 124 (1978), the Court held that claims that government land regulation effect a regulatory taking in violation of the 5th Amendment must be decided *ad hoc* based on their individual facts.

Question: Consistent with this constitutional baseline, can the California courts hold ***as a matter of law*** that regulations ***cannot*** be a taking even though they allow no more than 20% of a parcel (and likely far less than that) to be put to viable private use?

2. In *Williamson County Reg. Plan. Commn. v. Hamilton Bank,* 473 U.S. 172, 186 (1985), the Court held that a regulatory taking claim was not ripe for litigation until the regulator had reached a "final" determination of what use would be allowed on the property.

Question: When (a) a property owner undergoes an eight year administrative process, including environmental evaluation of ten different ways to use the property, but (b) the regulatory agency rejects all alternatives, then (c) has there been sufficient basis for an evidentiary showing that no reasonable use will be allowed, in order to demonstrate "finality" for 5th Amendment ripeness purposes?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties are listed in the caption:

- Petitioner Charles A. Pratt Construction Co., Inc. was the Plaintiff and Appellant below;

- Respondent California Coastal Commission was the Defendant and Respondent below.

Pursuant to S. Ct. Rule 29.6, Petitioner states that Charles A. Pratt Construction Co., Inc. has no parent corporation and no publicly held corporation owns more than 10% of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Charles A. Pratt Construction Co., Inc. petitions for a writ of certiorari to review a final judgment of the Court of Appeal of the State of California, Second Appellate District, Division Six.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Six is published at 162 Cal.App.4th 1068, 76 Cal.Rptr.3d 466, and is reproduced as Appendix A. The denial of rehearing is Appendix D. The opinion affirms a judgment of the Superior Court of the State of California for the County of San Luis Obispo, reproduced in Appendix B. The California Supreme Court's Order denying review (by a split vote) is reproduced in Appendix C.

JURISDICTION

The California Court of Appeal entered judgment on May 8, 2008, and denied a timely petition for rehearing (with a slight modification to the opinion) on June 9, 2008. The California Supreme Court denied review on August 20, 2008, although Justices Joyce

Kennard and Marvin Baxter voted to grant review.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, 5th Amendment:

". . . nor shall private property be taken for public use without just compensation."

U.S. Constitution, 14th Amendment:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law."

Pertinent portions of the California Coastal Act, Cal. Pub. Res. Code § 30000 *et seq.* are reproduced in Appendix E.

INTRODUCTION

Two decades ago, Justice Stevens had this comment about the Court's takings decisions:

> "[E]ven the wisest of lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence." (*Nollan v. California Coastal*

Commn., 483 U.S. 825, 866 [1987] [dissenting opinion].)

Notwithstanding decisions since then, the Court has refrained from establishing clear, bright line rules. (*Palazzolo v. Rhode Island*, 533 U.S. 606, 617 [2001] ["we have given some, but not too specific, guidance"]; *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg. Plan. Agency*, 535 U.S. 302, 326 [2002] ["we still resist the temptation to adopt *per se* rules"].)

Rather, the Court has held that — for almost all cases — the required process is the *ad hoc* factual analysis described in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) although, as the Court conceded recently "each [of the *Penn Central* factors] has given rise to vexing subsidiary questions . . . ." (*Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 [2005].)

Parties and lower courts can live with an *ad hoc* standard as long as there are *some* reliable guidelines for its application. This case shows the need for something more than the current *laissez faire ad hoc*ery. It was not subject to dispute that the regulations applied by Respondent California Coastal Commission would allow *no more than* 20% of Petitioner Pratt Construction Co.'s 124-acre property to be put to productive private use. Beyond that,

Pratt's appraiser opined that the regulations could actually limit use of the subject 124-acre tract to as little as *1120 square feet*. The California courts held *as a matter of law* that this severe restriction *could not* be a taking and granted summary judgment to the Coastal Commission without trial. (App. 22, 27.)

If, as the Court seems determined, *Penn Central* is to remain the takings touchstone,[1] then a manageable *ad hoc* factual test should be enforced by the Court and applied by lower courts after trials based on contested evidence, not merely on a subjective and unsupported judicial impression of what the regulatory impact on the landowner may be without an evidentiary trial. Otherwise, the judicial system simply morphs into Joseph Story's unfair and apocryphal world where justice is measured by the length of the Chancellor's foot. (See, e.g., *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 332-333 [1999]; *Lochnar v. Thomas*, 517 U.S. 314, 323 [1996].)

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[1] See *Tahoe-Sierra*, 535 U.S. at 326, n. 23, referring to *Penn Central* as "our polestar" (quoting Justice O'Connor's concurring opinion in *Palazzolo*, 533 U.S. at 633); *Lingle*, 544 U.S. at 538 ("regulatory takings challenges are governed by the standards set forth in *Penn Central* . . . .").

Beyond that foundational substantive issue, this case also presents an issue resulting from the continuing confusion wrought by the ripeness rules of *Williamson County Reg. Plan. Commn. v. Hamilton Bank,* 473 U.S. 172, 186 (1985).[2] The question here is how to determine when a regulatory body has reached a "final" decision about the use that property owners will be allowed to make of their land. Here, Pratt was put through nearly a decade of administrative review, including an environmental impact analysis of ten possible uses for the property. In rejecting them all, the Coastal Commission asserted that it could not accept any of the ten alternatives and that it could not suggest any modifications because "revisions that would be necessary . . . are so extensive . . . denial . . . is the *only* appropriate course. . . ." (19 AR 3176; emphasis added.)

In contrast to the flexible, *ad hoc* approach adopted for determining whether a taking has occurred, lower courts have transmogrified the flexible, three-factor *Penn Central* analysis into rigid rules regarding the number of

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[2] Recent examples of confusion caused by a different aspect of *Williamson County* appear in Petitions for Certiorari in *Braun v. Ann Arbor Charter Township*, No. 08-250 and *Agripost, LLC v. Miami-Dade County, Florida*, No. 08-567, currently pending before the Court.

development applications that need to be made and rejected before a "final" decision can be said to have been reached, even when the administrative action makes clear after a lengthy examination of alternatives that no economically viable use would be approved. At that point, reapplications become pointless.

In this case, the "one" application involved a detailed review process that lasted the better part of a decade and included environmental analysis that examined ten different ways to use the subject property. The Coastal Commission rejected them all. In light of the reasons given for the denial, that should suffice. (Compare *Palazzolo*, 533 U.S. at 620.) But not in California.

The federal constitutional issues were raised in the complaint and in subsequent briefing in all state courts, and were expressly ruled on by the Court of Appeal. (App. 16-21)

STATEMENT OF THE CASE

The 124-acre parcel of land in this case represents the last portion of undeveloped land in a part of San Luis Obispo County, California, known as Cabrillo Estates, a residential project begun in 1963. Eighty-one acres of this parcel were designated by Pratt as Unit II of Tract 308 in 1973, and planned for 149 homes, a plan the County approved in concept.

After Unit I of Tract 308 was completed, Pratt submitted (in 1990) a proposal for this parcel. Instead of 149 homes, Pratt sought only 41. Pratt also purchased an additional 43 acres and added them to the tract. The new acreage would be left undeveloped. County processing took nearly a decade (including an Environmental Impact Report [EIR] that examined ten alternative uses for the 124 acres), and the County Board of Suprervisors approved the project in 1999.

The project left 100 of the 124 acres (i.e., 80%) undeveloped, although the County's formal plan only demanded that 60% be undeveloped.[3] Nonetheless, several parties filed administrative appeals to the Coastal Commission.[4]

After a de novo hearing, the Coastal Commission rejected Pratt's permit. In doing so, the Commission had before it all of the data examined by the County, including the EIR and

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[3] The County's plan, called a Local Coastal Program, had been approved by the Coastal Commission, as required by law. (Cal. Pub. Res. Code § 30600.5.)

[4] The Coastal Commission has appellate jurisdiction over most land use permits issued by cities and counties in California's coastal zone. (Cal. Pub. Res. Code § 30603.)

the ten alternative developments that had been considered and analyzed. In rejecting development, the Coastal Commission concluded that it could not accept any of the ten alternatives and that it could not simply suggest modifications to any of them because "revisions that would be necessary . . . are so extensive . . . denial . . . is the *only* appropriate course. . . ." (19 AR 3176; emphasis added.) By affidavit, Pratt's appraiser opined that the restrictions on any new proposal could limit development to as little as 1120 square feet of the 124 acres. (14 CT 3948.)

The Coastal Commission's findings made clear that no development would be permitted, even though the Commission told Pratt to go through the motions of making additional plan applications to the County. Among other things, the Commission concluded the following. *First*, the property cannot be served by bringing in water from off-site, even though the local water service provider had contracted to do so. *Second*, the Commission viewed this property as a scenic backdrop for coastal property, i.e., that it served as some sort of ecological wallpaper for others to enjoy — but only as long as it had no houses built on it. *Third*, some 80% of the property constituted Environmentally Sensitive Habitat Area (ESHA) within the meaning of the California Coastal Act. *None* of that property, plus a

buffer zone around it, can be developed for productive private use. (E.g., Cal. Pub. Res. Code § 30240; *Bolsa Chica Land Trust v. Superior Court*, 71 Cal.App.4th 493, 508, 83 Cal.Rptr. 850 [1999]; *Sierra Club v. California Coastal Commn.*, 12 Cal.App.4th 602, 615, 15 Cal.Rptr. 779 [1993].) *Fourth*, the Commission sought to "preserve" the property for species that had never been seen on it. How can a rational landowner overcome that by repeated applications?

In short, as the Coastal Commission staff report for this project candidly put it, "development" would be "habitat degradation." (19 AR 3190.) That should be "final" enough to trigger litigation.

Pratt sued to overturn the Commission's ruling or, failing that, to obtain just compensation for the taking of its property for public use. The trial court denied all relief as a matter of law through judgment on the pleadings and summary judgment. (App. B.) The Court of Appeal affirmed (App. A) and the California Supreme Court denied review, with two Justices dissenting (App. C).

REASONS FOR GRANTING THE WRIT

I.

THERE IS CONFUSION IN THE LAW AS TO THE BASIC STANDARDS TO ESTABLISH A REGULATORY TAKING. LOWER COURTS AND LITIGANTS NEED THIS COURT'S GUIDANCE.

It would be easy to cite treatises and law reviews attesting to the absence of standards in regulatory taking law and the need for guidance from the Court.

Easy, but not necessary. The Court's own opinions make the point clearly, and decisions like the one below show the need for guidance.

> "In Justice Holmes' well-known, if less than self-defining, formulation, 'while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking.'" (*Palazzolo*, 533 U.S. at 617 [quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)].)

> "The rub, of course, has been — and remains — how to discern how far is 'too far.'" (*Lingle*, 544 U.S. at 538.)

"[W]e have 'generally eschewed' any set formula for determining how far is too far, choosing instead to engage in 'essentially ad hoc, factual inquiries.'" (*Tahoe-Sierra*, 535 U.S. at 326 [quoting *Lucas v. South Carolina Coastal Council*, 438 U.S. 1003, 1005 [1992], which, in turn, quoted *Penn Central*, 438 U.S. at 124].)

"Since *Mahon*, we have given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking." (*Palazzolo,* 533 U.S. at 617.)

"[O]ur regulatory takings jurisprudence cannot be characterized as unified . . . ." (*Lingle*, 544 U.S. at 538.)

"Indeed, we still resist the temptation to adopt *per se* rules in our cases involving partial regulatory takings, preferring to examine 'a number of factors' rather than a simple 'mathematically precise' formula." (*Tahoe-Sierra*, 535 U.S. at 326.)

> "Our polestar instead remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings." (*Tahoe-Sierra*, 535 U.S. at 326, n. 23 [quoting with approval from *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring)].)
>
> "The temptation to adopt what amount to *per se* rules must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context." (*Tahoe-Sierra*, 535 U.S. at 326, n. 23 [quoting with approval from *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring)].)
>
> "Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors . . . ." (*Palazzolo*, 533 U.S. at 617.)

The Court has thus created a rule that provides no road map to those who have to either live with it or apply it. Property owners thus have to litigate through the last court of

last resort that will hear them in order to learn whether they have even properly drafted a complaint alleging a 5th Amendment claim. There has been enough litigation of this sort during the last three decades for the law to have progressed beyond elementary pleading.

The result of the Court's reluctance to provide guidance has led to anarchy. A prominent text summed up this Court's regulatory taking decisions as belonging to "the gastronomic school of jurisprudence; that is, this is an area where government acts according to gut feeling in the individual case, instead of by rule of law." (1 Norman Williams, Jr. & John M. Taylor, American Land Planning Law 103 [2003 rev. ed.].)

> "In these decisions, the Court has said again and again that there is no one formula for deciding the taking issue, and thus the Court has simply decided each case 'on the merits.' Translated into plain English, this is a frank admission . . . that cases are decided with little guide to predictability for future decisions." (*Id.* at 102.)

Without a "guide to predictability for future decisions," lower courts are adrift in the proverbial rudderless boat on an uncharted sea,

and thus free to measure justice by the size of their own feet. As Professor Eagle put it, "[w]hile recourse to a totality-of-the-circumstances test permits the Court almost unlimited latitude in decision making, it gives little guidance to the federal and state courts that must apply it." (Steven J. Eagle, Tahoe Sierra *and Its Implications for Takings Law*, in Taking Sides on Takings Issues: The Impact of *Tahoe-Sierra*, ch. 1B at 22 [Thomas E. Roberts, ed. 2003].) A recent decision of the Court of Appeals for the Federal Circuit described this Court's test as a "gestalt approach" (*Bass Enterprises Prod. Co. v. United States*, 381 F.3d 1360, 1370 [Fed. Cir. 2004]) — a judicially polite way of saying there are no rules.

Commentators from both ends of the political spectrum have called for the Court to discard the *Penn Central* test.[5] Both have

[5] E.g., John D. Echeverria of Georgetown's Environmental Policy Center not only wrote an amicus brief for environmental organizations in *Tahoe-Sierra* urging the Court to overrule *Penn Central*, he published an article with a revealing title. (John D. Echeverria, *Is The* Penn Central *Three Factor Test Ready For History's Dustbin?* 52 Land Use L. & Zoning Digest 3 [2000].) Professor Richard Epstein of the University of Chicago filed an amicus brief in the same case on behalf of the Institute for Justice asking the Court to do likewise.

explained the shortcomings of the *Penn Central* mode of analysis, basing their conclusions on the three decades of experience that lower courts and litigants have had with it.

Nonetheless, the Court seems determined to maintain the *Penn Central* test as "the default rule . . . in the regulatory taking context . . . ." (*Tahoe-Sierra*, 535 U.S. at 332.) If that is to be the case, lower courts and litigants are in desperate need of guidance in how to apply it.

Here, for example, there is no dispute that existing regulations prevent the use of at least 80% of the property (and probably substantially more — something that, if permitted, a trial would have revealed). The Coastal Commission found that 80% of the property was undevelopable ESHA. Both the Coastal Act and cases decided under it preclude private use of that property plus a protective buffer around it. (Cal. Pub. Res. Code § 30240; *Bolsa Chica Land Trust v. Superior Court*, 71 Cal.App.4th 493, 508, 83 Cal.Rptr. 850 [1999]; *Sierra Club v. California Coastal Commn.*, 12 Cal.App.4th 602, 615, 15 Cal.Rptr. 779 [1993].) Perversely, the court below felt free to invert that statistic and to proclaim as a matter of law that no taking could have occurred because "[a]ssuming Pratt's claim is true, that leaves 20 percent of

the 121-acre tract, over 24 acres, available for development." (App. 17.)[6]

The anarchy is demonstrated by the conflict of the conclusion below with the long-running Florida Rock litigation in the Court of Federal Claims and the Federal Circuit Court of Appeals.[7] In the final chapter of that litigation, the court concluded that Corps of Engineers regulations that reduced the value of the property by 73.1% — a similar, but lesser, restriction than the 80+% here — established a taking that required compensation. (*Florida Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21, 36 [1999].)

The lower courts, and the government agencies and property owners served by them, need guidance. It should be apparent that the

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[6] This was a pure assumption made without evidence, based on a supposition that if 80% of the property was undevelopable ESHA, the remainder must be available for development. Evidence (including the proferred affidavit of an appraiser showing that current regulations could restrict development to a scant 1120 square feet of this 124-acre tract) would have shown otherwise.

[7] See, e.g., (all cases bearing the name *Florida Rock Indus., Inc. v. United States*), 18 F.3d 1560 (Fed. Cir. 1994); 21 Cl. Ct. 161 (1990); 791 F.2d 893 (Fed. Cir. 1986); 8 Cl. Ct. 160 (1985).

Court's desire to refrain from establishing firm rules has not served well. It allows so much flexibility to lower courts that this constitutional field is left with no real standards at all. The result is a continuous roiling of the litigation waters below, with a steady stream of academic criticism and certiorari petitions to this Court.

If *Penn Central* is to remain the "polestar," as the Court seems intent on maintaining it, then the *ad hoc* factual examination required by it needs to be enforced. Courts like the one below cannot be allowed to pronounce *ex cathedra* that the severe land use regulation before them is not severe enough to warrant constitutional condemnation — or even a trial to determine the actual impact.

In *Tahoe-Sierra*, the Court concluded that *Penn Central*'s *ad hoc* rule is the "default" rule for regulatory takings. (535 U.S. at 332.) Just so. But if "*ad hoc*" is to be the rule, then it must require trial as part of "the default rule" to determine the factual impact of the regulation in question. Otherwise, it isn't *ad hoc* and it isn't a rule — it is more in the nature of judicial whim on the part of lower court judges.

Since the Court re-entered the regulatory takings realm in 1978 with *Penn Central*,[8] it has shied away from providing clear rules defining regulatory takings. Instead, as quoted above, the Court has provided the lower courts, the bar, and the citizenry with a series of generalities that provide no guidance. It is time for a change. If there are to be no black letter rules, then there needs to be a clear requirement that evidence of the *ad hoc* situation be provided to, and passed on by, a trier of fact. There is no way to make rational *ad hoc* decisions than to root them in facts.

II.

THE CALIFORNIA COURTS' ANALYSIS CONFLICTS WITH THIS COURT'S SETTLED REGULATORY TAKING DECISIONS. IF THE UNDERLYING PRECEPTS ARE TO BE CHANGED, THAT CHANGE MUST COME HERE, NOT FROM AN INTERMEDIATE STATE COURT.

The California Court of Appeal justified the Coastal Commission's regulatory action by asserting there was a valid basis for it: "it is the lack of water, not a regulation, that causes the harm." (App. 19.) That is foundationally

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[8] The Court had absented itself after deciding *Pennsylvania Coal Co. v. Mahon* in 1922.

wrong because the protection afforded the rights of property owners by the 5th Amendment cannot be undone by focusing on the good intentions of the regulator.

Valid regulations, enacted for benign, or even beneficent, purposes require compensation if their impact on private property violates the 5th Amendment. (*First English*, 482 U.S. at 315 [5th Amendment designed "to secure compensation in the event of *otherwise proper interference* . . ."] [emphasis added]; *McDougal v. County of Imperial*, 942 F.2d 668, 676 [9th Cir. 1991] [rejecting notion that "any legitimate purpose automatically trumps the deprivation of all economically viable use, such that whenever a regulation has a health or safety purpose, no compensation is ever required."].)

Indeed, the California rationale would eliminate constitutional liability for all regulations — overturning, in the process, each of this Court's decisions to the contrary. It could, for example be said that it is the presence of endangered species, not a regulation protecting them, that causes harm to private property. Yet such regulations result in liability. (*City of Monterey*, 526 U.S. 687.) Or it could be said that it is the need for coastal access, not a regulation demanding it, that causes harm to private property. Yet access regulations can still cause a taking. (*Nollan*,

483 U.S. 825.) Or it could be said that it is the danger to coastal resources, not regulations protecting them, that causes harm to private property. Yet those regulations, too, can cause a taking. (*Lucas*, 505 U.S. 1003.)

In short, to prevail in a regulatory taking case, the Coastal Commission needs to do more than simply assert (as it did below) that its actions are consistent with the general public interest as expressed in the Coastal Act:

> "We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common law maxim . . . . As we have said, a 'State, by *ipse dixit*, may not transform private property into public property without compensation . . . .' [Citation.]" (*Lucas*, 505 U.S. at 1031.)

In regulatory taking cases, it is the *impact* of the regulations that is at the heart of the *ad hoc* analysis, not the worthiness of the justification. Good intentions do not trump the constitution. (*First English*, 482 U.S. at 315.) Impermissible government action is *ultra vires*

and void. (*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 [1952] [wartime seizure of steel mills voided].) That is why it is the regulation, not the rationalization, that is of controlling importance. (E.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 [1982]; *Kaiser Aetna v. United States*, 444 U.S. 164, 174 [1979] [government regulations pursuing commendable goals were nonetheless takings].)

The ease with which the California courts used their belief in the rectitude of the regulatory purpose to prevent a trial on the impact of the regulation on the property owner demonstrates strongly the need for this Court's intervention. Belief in the righteous basis for regulatory action cannot eliminate the rights of the regulated — at least their right to present evidence of the impact of the regulation. Not if *Penn Central* is to retain any meaning at all.

III.

ENOUGH IS ENOUGH. HOW MUCH PROCESS MUST A PROPERTY OWNER SUFFER BEFORE AN AGENCY'S POSITION IS DEEMED "FINAL" ENOUGH FOR JUDICIAL REVIEW ON THE MERITS?

Due process can be denied by too much as well as not enough process — indeed, it can drown any semblance of due process of law. Years ago, Fred Bosselman, dean of the national land use bar, queried whether "our system of land use and environmental regulation [can] become so Byzantine as to deny due process of law to the participants through the sheer complexity of the system." (Quoted in Donald Hagman & Dean Misczynski, Windfalls for Wipeouts 12 [1978].)

This case shows how Bosselman's fears have materialized. This Court had a valid goal when it sought to restrict review of local government decisions to those in which the agency had reached a "final" determination of how a property owner would be allowed to make use of land. Premature adjudication serves no one. (See *Williamson*, 473 U.S. at 186; *Palazzolo*, 533 U.S. at 618.) However, some lower courts have used the Court's pragmatic desire for "finality" to launch a quest for some sort of holy

grail, thus putting off finality indefinitely, rather than viewing the facts — *ad hoc* — to determine whether enough process had been had. Just as the Court disagreed with contrary conclusions by the Rhode Island courts in *Palazzolo*, 533 U.S. at 619, the decision below cannot stand.

This case is a paradigm for two reasons.

First, during the administrative process leading up to the Coastal Commission's ruling, Pratt had spent the better part of a decade intensively working with County officials to process a development plan. As part of that process, an EIR was prepared by the County (and subjected to full probing at public hearings) that analyzed ten different alternatives for using this property. The project that is the subject of this litigation was the preferred choice by both the County Board of Supervisors and Pratt.

When the County's permit issuance was appealed to the Coastal Commission, the Commission had before it the entire record of County proceedings, including the EIR. The Commission not only rejected the permit the County had approved, it rejected the other alternatives as well. It did this by concluding that there was no way it could suggest to modify the project (e.g., by using or slightly

altering one of the alternatives) because "revisions that would be necessary . . . are so extensive . . . denial . . . is the *only* appropriate course. . . ." (19 AR 3176; emphasis added.)

Notwithstanding the Coastal Commission's suggestion that some alternative must be available that could be approved (see App. 18), the facts belie that suggestion. The reasons given by the Commission for denial will not change. The water available on site will not increase.[9] The extent of the ESHA will not decrease. The utility of the property as a scenic background for the already-developed part of the community will not change. As the Court held in *Palazzolo*, once it is clear that the reasons for denial will not change, there is no need to waste time making additional applications merely for the sake of making applications:

> "Ripeness doctrine does not require a landowner to submit applications

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[9] Please recall that the water service company for San Luis Obispo County had assured Pratt and the County that it could provide adequate water for the project. The Coastal Commission simply did not like the idea of bringing water from off-site (although the County had approved) and the courts gave short shrift to the water company's promise. (App. 19.)

for their own sake." (533 U.S. at 622.)[10]

In this context, rigid application of a multiple application rule makes no more sense than it did in *Palazzolo*. The Coastal Commission's views on private development of this property are clear. The rejection of all ten alternatives analyzed in the EIR removes any doubt. In the ripeness framework of *Williamson County*, where the idea is to allow sufficient consideration of alternatives to be able to conclude that sufficient finality has been reached to allow a court to conduct a 5th Amendment analysis, it should make no difference whether the various alternatives were considered seriatim, as part of technically separate permit applications, or as part of one comprehensive analysis of the property, as here. The point is to find the answer, not to engage in process for its own sake.

Second, the Coastal Commission has only administrative appellate jurisdiction over this

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[10] The Court of Federal Claims has applied this rule for years against the federal government. (E.g., *Formanek v. United States*, 18 Cl. Ct. 785, 792 [1989]; *Beure-Co. v. United States*, 16 Cl. Ct. 42, 49 [1988]; *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 386 [1988].)

property, not plenary land use control. The latter is held by San Luis Obispo County. The only time the Coastal Commission has even the potential of reviewing the use of this property is if the County grants a development permit and some project opponent appeals, as happened here. (Cal. Pub. Res. Code § 30603[a].) In no event does Pratt have the ability to present an application directly to the Coastal Commission. (Cal. Pub. Res. Code§ 30603.)

Thus, unlike *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), it is virtually impossible for Pratt to receive repeated plan rejections from the Coastal Commission. As noted above, however, the scrutiny given by the Commission in this one intense experience was the equivalent of multiple plan applications and rejections. If the Commission cannot be called to account in this situation, then the Court may as well issue it a certificate of 5th Amendment immunity, because it is unlikely that any compensation case will ever ripen against it. [11]

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[11] The Commission's most famous case, of course was *Nollan*, 483 U.S. 825, which it lost on 5th Amendment grounds, but no compensation was sought there.

"Ripeness" should not be a game. To Pratt and other land developers, it feels as though that is what it has become for regulators.[12] After three decades of planning efforts, on projects that reduced the proposed density of the project from 149 homes to 41 homes and from a design that virtually covered the property with houses to one that leaves 80% of it undeveloped, the courts below held that this case was still not ripe. On the contrary, litigation may be the only thing it *is* ripe for.

As *Palazzolo* put it, the point of a ripeness investigation is to make sure that the regulator's intentions with regard to the property are known with a "reasonable degree of certainty . . . ." (533 U.S. at 620.) Not "complete" certainty; a "reasonable degree" thereof. The law cannot demand more. It is not, after all, science. Pragmatic evaluation must be the hallmark. The facts here show

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[12] Justice Brennan described a famous incident in which a prominent government lawyer waxed exuberant over the gaming aspects of the system and the ability to keep property owners running like hamsters on a wheel. (*San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 655, n. 22 [1981] [dissenting opinion].) Since Justice Brennan brought the games to light, public acknowledgement has gone to ground. But the games remain afoot.

that rigid enforcement of a "more than one" application rule will neither answer the ripeness question nor achieve a just result.

The Coastal Commission's hostility to development of this parcel is clear in the staff report which, among other things, equates "development" with "habitat degradation" (19 AR 3190) and views the Pratt property as some variety of ecological wallpaper for others to enjoy as "an open space backdrop" (19 AR 3202) for their own homes. It also sought to "preserve" habitat for species never seen on the property. (Compare *City of Monterey*, 526 U.S. at 695 [city sought to create habitat for butterfly not found on the property].)

If the concept of ripeness in regulatory taking cases is to have any meaning, it must be grounded in pragmatism and freed of rigidity. As this case shows, the record of a single permit consideration can be sufficient to prove a "final" determination of what use will be allowed on the property.

CONCLUSION

It has been three decades since the Court created the *Penn Central* mode of *ad hoc* factual examination of each regulatory taking case. The Court has steadfastly refused to

provide more specific guidance on how to conduct such an *ad hoc* review. As a result, lower courts have taken advantage of the vacuum and adopted what some informed observers have called a "gastronomic" process and others a "gestalt" process. Whatever called, the process leaves litigants adrift, with no clue how cases will come out. More to the point, it leaves lower courts with the ability to revert to the Chancellor's foot standard of justice.

If the Court's *ad hoc* approach is to have any meaning, then there is no room for decisions like the one below that, without a trial, decided as a matter of law that regulatory action stripping a property owner of *at least* 80% of the use of valuable land — and probably far more, as a trial would have shown — cannot be a taking.

That cannot make sense under an *ad hoc* rule. Certiorari is needed in order to make as much sense as possible out of the *Penn Central* factors.

Certiorari is also needed to restore flexibility to ripeness determinations. Whereas the Court has insisted on *ad hoc* evaluation of whether a taking has occurred, the lower courts have read the Court's ripeness decisions as providing a hard, *per se* line in the sand: to achieve

ripeness, the property owner must make more than one development application. Rigidity is no more help on this issue than under the *Penn Central* analysis. This case shows the need for flexibility and provides a prime opportunity for the Court to provide it.

Respectfully submitted,

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APPENDIX "A"

Filed 5/8/08

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

CHARLES A. PRATT CONSTRUCTION CO., INC., Plaintiff and Appellant, v. CALIFORNIA COASTAL COMMISSION, Defendant and Respondent.	2d Civil No. B190122 (Super. Ct. No. CV 000697) (San Luis Obispo County)

If "it's a long, long time from May to December,"[1] it's an eternity from 1973 to 2008. But time, as Einstein taught us, is relative.

From a developer's perspective, time stops when rights vest. Government Code section 66498.1 confers a vested right to proceed with a development that complies with local ordinances in effect when a local agency approves a vesting tentative map. But if a development does not comply with state and federal

[1] See and listen to "September Song" – music by Kurt Weill; lyrics by Maxwell Anderson.

laws, the march of time is inexorable notwithstanding section 66498.1. This illustrates yet another perspective about time: "Nothing endures but change." (Heraclitus, a Greek philosopher, 540-475 B.C.)

Charles A. Pratt Construction Co., Inc. ("Pratt") filed this petition for a writ of administrative mandate, ordinary mandate and for damages against the California Coastal Commission ("Commission"). Pratt sought an order requiring the Commission to set aside its decision denying it a coastal development permit under the California Coastal Act (Pub. Resources Code, § 30000 et seq. ("Coastal Act")),[2] and for damages arising from a regulatory taking of its property. The trial court denied Pratt's petition for writ of administrative or ordinary mandate, and dismissed its taking claim as not ripe. We affirm.

FACTS

The History

The issues in this appeal involve a vesting tentative subdivision map in 1990. Earlier events set the issues in context.

In May of 1973, the San Luis Obispo County ("County") approved Pratt's tentative subdivision map designated as Tract 308, Units I and II. Unit I was a 25-acre parcel which could be divided into 86

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[2] All statutory references are to the Public Resources Code unless otherwise stated.

residential lots. Unit II was an 81-acre parcel which could be divided into 149 residential lots.

The County's approval was in concept only. It was subject to a number of conditions, such as approval of a grading plan and erosion control plan. Over the course of five years, the County gave Pratt extensions of time to meet the conditions.

Eventually, Pratt filed a claim with the South Central Coast Regional Commission ("Regional Commission")[3] seeking a determination that it had a vested right to subdivide Unit I into 86 lots and to complete offsite improvements. Pratt did not make a claim of a vested right for Unit II. The Regional Commission denied Pratt's claim to a vested right for a final map for Unit I. But the Regional Commission found Pratt did have a vested right to complete offsite improvements because of the substantial investment Pratt had made for those improvements.

Pratt petitioned the superior court for a writ of mandate to vacate the Regional Commission's denial of the final map for Unit I. The superior court granted Pratt relief, and the Regional Commission appealed. The Court of Appeal held that approval of the tentative map did not give Pratt a vested right because Pratt had not satisfied the conditions necessary to fulfill the requirements of the map. (*South Central*

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[3] The Commission has succeeded to the powers of the Regional Commission. (§ 30305.)

Coast Regional Com. v. Charles A. Pratt Construction Co. (1982) 128 Cal.App.3d 830, 846.) Nevertheless, the court held that because Pratt was allowed to complete the offsite improvements, the Commission must grant a permit to complete the subdivision so long as the subdivision comports with the land density requirements of the Coastal Act. (*Id.* at p. 848.) Again, the court considered only the 25 acres of Unit I. (*Id.* at p. 835.)

In 1985, Pratt submitted a new vesting tentative map to the County as Tract 1342. The new map contemplated subdivision of the 25 acres of Unit I into 40 lots with a remainder parcel of 81 acres, Unit II. A remainder parcel is one that is not proposed for development and is not counted as part of the subdivision. (Gov. Code, § 66424.6.) The County and the Commission approved the application. A final map was recorded in 1989.

The Project

In February of 1990, for the first time, Pratt applied for a new vesting tentative map, Tract 1873, that encompassed the 81 acres of Unit II, plus an additional 40 acres for open space. The new map proposed 41 residential lots. The County approved Tract 1873 on September 1, 1999.

A number of parties, including governmental agencies, appealed the County's approval to the Commission. The Commission found the appeal

presented substantial issues and set the matter for a de novo hearing. (§ 30625, subd. (b).)

At the hearing, Pratt claimed that Unit II was exempt from the Coastal Act. Pratt's claim of exemption was based on the theory that he had a vested right to complete the project or at least a vested right to complete the offsite improvements. In June of 2000, the Commission rejected Pratt's vested rights claim, and denied his application for a coastal development permit.

Pratt filed the instant action for mandamus to require the Commission to vacate its decision denying the development permit and for damages. Pratt alleged, among other matters, that the 1990 vesting tentative map vested his rights subject only to laws and policies in existence at the time, and that the Commission's decision was based on post-vesting policies. Pratt also alleged that the Commission has taken his property without compensation in that it deprived him of substantially all economically viable use of his property, has defeated his reasonable investment-backed expectations, and has unreasonably delayed his right to make beneficial use of his property.

The trial court denied Pratt's petition for writ of mandate because it found Pratt had no vested rights and that the Commission's decision denying the development permit is based on substantial evidence. The trial court granted judgment on the pleadings on

Pratt's taking causes of action on the ground that the actions are not ripe for adjudication.

DISCUSSION

I

Pratt contends the Commission lacked jurisdiction to consider the appeal.

Pratt points out that the Commission's appellate jurisdiction is limited to determining whether the permit issued by the County is consistent with the Local Coastal Plan ("LCP") and whether the permit violates coastal access policies. (§ 30603, subd. (b).) Here, because no issues were raised concerning coastal access, jurisdiction is limited to determining whether the County's permit is consistent with the LCP.

Pratt argues that his filing of the vesting tentative map in 1990 gave him the right to develop his property subject only to laws and policies existing at the time. Pratt claims, and the Commission does not dispute, that the Commission's denial of his coastal development permit is based on policies enacted after he filed his vesting tentative map.

Pratt's vested rights argument relies on Government Code section 66498.1, subdivision (b). Subdivision (b) provides in part: "When a local agency approves or conditionally approves a vesting tentative map, that approval shall confer a vested right to proceed with development in substantial compliance

with the ordinances, policies, and standards described in Section 66474.2." Subject to exceptions not relevant here, Government Code section 66474.2, subdivision (a) requires a local agency to apply only those ordinances, policies and standards in effect on the date the local agency has determined the tentative map application is complete.

The flaw in Pratt's argument is Government Code section 66498.6, subdivision (b). That subdivision provides: "The rights conferred by this chapter shall relate only to the imposition by local agencies of conditions or requirements created and imposed by local ordinances. Nothing in this chapter removes, diminishes, or affects the obligation of any subdivider to comply with the conditions and requirements of any state or federal laws, regulations, or policies and does not grant local agencies the option to disregard any state or federal laws, regulations, or policies."

In an attempt to avoid Government Code section 66498.6, Pratt claims that once the LCP is certified by the Commission, it becomes a matter of local law. Thus, Pratt argues, the vesting provisions of Government Code section 66498.1, subdivision (b) apply.

Under the Coastal Act's legislative scheme, however, the LCP and the development permits issued by local agencies pursuant to the Coastal Act are not solely a matter of local law, but embody state policy. The Commission's primary responsibility is the implementation of the Coastal Act. It is designated the state coastal zone planning and management

agency for any and all purposes. (§ 30330.) Local government prepares the LCP. (§ 30500, subd. (a).) But the LCP must be submitted for the Commission's approval. (§ 30512, subd. (a).) The Commission may certify the LCP only if it meets the requirements of and is in conformity with the policies of the Coastal Act. (§ 30512, subd. (c).) Zoning and other actions to implement the LCP must also be submitted to the Commission for approval. (§ 30513.) Once the Commission certifies the LCP and all implementing actions become effective, the Commission's authority over coastal development permits is "delegated to the local government. . . ." (§ 30519, subd. (a)) Finally, the Commission has appellate jurisdiction to determine whether the development permit issued by the local government is consistent with the LCP and coastal access policies. (§ 30603, subd. (b).)

Although local governments have the authority to issue coastal development permits, that authority is delegated by the Commission. The Commission has the ultimate authority to ensure that coastal development conforms to the policies embodied in the state's Coastal Act. In fact, a fundamental purpose of the Coastal Act is to ensure that state policies prevail over the concerns of local government. (See *City of Chula Vista v. Superior Court* (1982) 133 Cal.App.3d 472, 489 [Commission exercises independent judgment in approving LCP because it is assumed statewide interests are not always well represented at the local level].) The Commission applies state law and policies to determine whether the development

permit complies with the LCP. Under Government Code section 66498.6, subdivision (b), such state laws and policies are not subject to the vesting provisions of Government Code section 66498.1, subdivision (b). The filing of Pratt's vesting tentative map did not deprive the Commission of jurisdiction.

Pratt's reliance on *Yost v. Thomas* (1984) 36 Cal.3d 561, is misplaced. There, after the Commission certified the LCP, the city approved a general plan amendment, a specific plan and rezoning affecting property in the coastal zone. Opponents of the city's acts sought to rescind them by referendum. The property owner claimed the city's acts were not subject to referendum because they were administrative, and only legislative acts are subject to referendum. Although the acts are ordinarily legislative, the owner argued that the requirement that the city comply with the LCP makes the city an agent of the state in enacting land use policies in the coastal zone. (*Id.* at p. 571.) Our Supreme Court rejected the argument, stating: "[The Coastal Act] leaves wide discretion to a local government not only to determine the contents of its land use plans, but to choose how to implement those plans. Under such circumstances a city is acting legislatively and its actions are subject to the normal referendum procedure." (*Id.* at p. 573.)

Yost stands for nothing more than that a city's actions in implementing the LCP retain their legislative nature for the purposes of referendum. That does not mean that once the LCP is certified, it becomes a matter of local law. The city's actions in implementing

the LCP, as well as any coastal development permit issued by the city, are still subject to Commission review. (§§ 30513, 30603.) *Yost* did not involve the question at issue here. A case is not authority for issues it does not consider. (*Contra Costa Water Dist. v. Bar-C Properties* (1992) 5 Cal.App.4th 652, 660.)

II

Pratt contends the Commission's actions were arbitrary and capricious. We must uphold the Commission's findings of fact if they are supported by substantial evidence. (*Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1282, 1288-1289.) We reverse if no reasonable person would have reached the same conclusion. (*Id.* at p. 1289.)

(a)

Pratt argues the Commission erred in treating the vast bulk of his property as an Environmentally Sensitive Habitat Area (ESHA). It claims the LCP designates that portion of its property as a Sensitive Resource Area (SRA). Pratt claims that an ESHA is only one type of SRA. It points out that there are other types of SRA's, but the ESHA is the most extreme in its impact on development.

The map on which Pratt relies shows a large portion of its land designated as an SRA. But the map also shows the area designated as a "terrestrial habitat." A legend on the map lists "terrestrial

habitats" as among "sensitive resource areas that are also environmentally sensitive habitats." Thus substantial evidence supports the Commission's treatment of a large portion of Pratt's parcel as an ESHA.

Pratt's reliance on *Security National Guaranty, Inc. v. California Coastal Com.* (2008) 159 Cal.App.4th 402, is misplaced. There the court determined that the Commission has no jurisdiction on an appeal of a coastal development permit to designate a new ESHA that contradicted the terms of a certified LCP. Here the Commission did not seek to create a new ESHA designation on Pratt's land. It simply determined correctly that the LCP had designated much of Pratt's land to be an ESHA.

(b)

Pratt argues the Commission used the County's generic provision for view protection rather than the LCP. Pratt does not specify in what way the Commission relied on the County's generic rules instead of the LCP in assessing visual impacts. Instead, Pratt cites a number of ways in which it believes it has complied with the LCP.

Pratt points out that the LCP requires clustering of homes in a way that leaves 80 percent of the property undeveloped. But that does not mean that the proposed development on the remaining 20 percent complies with all other policies of the LCP.

Pratt points out that the LCP encourages placing development in "slope created 'pockets'" to minimize visual impacts. Pratt argues the County found its project satisfies that standard. But if the Commission were bound by the County's finding that the project complies with the LCP, there would be no reason to allow an appeal to the Commission. It is simply no argument to say that the County found the project meets the LCP's view preservation requirements. The Commission recommended that development be limited to below the 600-foot contour, as in an alternative project approved by the County's planning commission. That would be the same elevation as homes in an existing adjacent site.

Pratt claims its project will satisfy the requirement that building materials use native materials and textures. Assuming that is true, it does not mean other visual impacts meet the requirements of the LCP.

(c)

Pratt challenges the Commission's findings on the availability of water. Pratt points out that it obtained a "can and will serve" letter from the Southern California Water Company. Pratt claims the Commission simply ignored the letter.

But it is undisputed that Pratt's project lies outside the Urban Services Line ("USL"). The LCP allows development outside the USL only "if it can be serviced by adequate private on-site water and waste

disposal systems." Thus a commitment by a community offsite water company, such as Southern California Water Company, is insufficient.

Pratt points out that Southern California Water Company plans to supply a private onsite man-made reservoir. The County found this sufficient to satisfy the LCP's "private on-site water" requirement. But the Legislature made the Commission, not the County, the final word on the interpretation of the LCP. (See, § 30603, subd. (b).) Indeed, under the County's interpretation of the LCP, community offsite water service becomes private onsite water service simply because the water is temporarily stored in a man-made reservoir. Under the County's interpretation, the LCP's intent to give priority for community-based services to land within the USL is easily defeated. The most reasonable interpretation of the LCP's "private on-site water" requirement is that it is limited to water developed from naturally occurring sources on the project site. Pratt's project does not meet that requirement.

(d)

Pratt argues that the Commission suffers from "legal myopia" in its determination that no development can occur on the Pratt property until after all the "infill" lots within the USL have been "built out."

The Commission concluded: "The project is inconsistent with LCP provisions that prohibit subdivisions unless there are adequate public services to

accommodate the new lots, after priority uses such as agriculture and infill of existing lots within the urban area have been accommodated. Because there are significant unresolved issues with respect to the availability of such services, particularly water and sewage treatment, the project can not [sic] be found to be consistent with these LCP requirements and therefore must be denied."

Pratt does not dispute the Commission's conclusion that the LCP mandates infill lots within the USL have priority on public services. Instead, Pratt asserts, without citation to the record, that the infill lots are under an indefinite, if not permanent, moratorium imposed by the Regional Water Quality Control Board. Assuming the infill lots are under a moratorium, Pratt cites no authority that the moratorium frees the Commission from enforcing the policy contained in the LCP giving priority to the infill lots.

(e)

Pratt argues there is no basis for the Commission's combined water and sewer objections. Pratt points out that the Environmental Impact Report (EIR) for the project concludes that the water usage and replenishment for the project are essentially in balance.

The final EIR for the project states that the groundwater basin on which the project would rely is in overdraft. The final EIR also states, however, that unlike most projects, Pratt's project would actually

increase recharge of the groundwater basin. The EIR quotes a comment from the County's engineering department after its review of the draft EIR: "'In the worst-case scenario, the project would increase the overdraft by 2.5%; in the best case, the project would reduce the overdraft by less than 1%. . . .'"

In rejecting the EIR's conclusion, the Commission stated: "Based on the assumed increase in recharge that would result from the project, and the expectation that this recharge will exceed the consumptive water use of the project, the EIR concludes that the project will result in a net increase of available water resources, and no significant impacts to water resources will occur. [Fn. omitted.] [¶] The Commission can not [sic] agree with this assumption, based upon the highly speculative nature of the amount of recharge being assumed by the EIR. It appears scientifically unfounded that the proposed development, which will cover open space areas comprised of sandy soils and drought tolerant vegetation with impervious surfaces, will increase the amount of groundwater recharge that is currently occurring on the site. Appendix C of the Final EIR does not provide the data necessary to support this questionable assumption."

Pratt cites no authority that the Commission is bound by the findings in the draft EIR. Here the Commission simply rejected a conclusion that seems at best highly suspect. In any event, even if the project balanced water usage and replenishment, that

would not affect the LCP's policy giving priority to other uses.

Each of the Commission's reasons for denying the permit is supported by the record. Any one of them is sufficient to sustain the denial.

III

Pratt contends that if the Commission's interpretations of the LCP are correct, there is no economically productive use that can be made of its property. Pratt concludes its taking claim is ripe for adjudication.

The Fifth Amendment to the United States Constitution prohibits a taking of property for public use without just compensation. The Supreme Court has articulated two circumstances that constitute a categorical taking: where the regulation allows a permanent physical invasion of the property or where the regulation deprives the owner of all economically viable use. (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015.)

In *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104 (*Penn Central*), the Supreme Court discussed non-categorical takings. The court observed, "[T]he 'Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. . . .'" (*Id.* at p. 123, quoting *Armstrong v.*

United States (1960) 364 U.S. 40, 49.) The court stated that whether a regulation becomes a taking under this standard will rest on an ad hoc factual inquiry into the particular circumstances of the case. (*Id.* at p. 124.) It is only when a regulation goes "too far" that it becomes a taking. (*Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 415.)

Here the trial court dismissed Pratt's taking claim pursuant to the Commission's motion for summary adjudication on the ground that the claim is not ripe. As the Supreme Court explained in *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 618, "[A] takings claim challenging the application of land-use regulations is not ripe unless 'the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.'" (Quoting *Williamson Planning Com. v. Hamilton Bank* (1985) 473 U.S. 172, 186.) A final decision by the responsible state agency determines whether a regulation has deprived a landowner of all economically beneficial use of his property or results in a non-categorical taking under *Penn Central.* (*Palazzolo,* at p. 618.)

Pratt claims that 80 percent of his tract is designated ESHA and that no development is possible in an ESHA. Assuming Pratt's claim is true, that leaves 20 percent of the 121-acre tract, over 24 acres, available for development.

Moreover, the Commission noted the availability of alternative lot configurations, such as one approved

by the County's planning commission, as sensitive to both habitat and views. Pratt appealed the planning commission's approval to the County's Board of Supervisors where it was overturned. Far from showing the Commission has made a final determination as to what use, if any, will be allowed for Pratt's property, the Commission has shown its willingness to consider alternatives to Pratt's proposal.

Pratt argues the Commission decided the project cannot satisfy the water requirements for three reasons: the project has no water onsite; it is outside the USL and cannot have water brought to it; and the Commission is on record as refusing a division of one parcel into three inside the USL because there is not enough water.

The Commission stated: "As detailed above, the existing demand on water from the Los Osos Groundwater Basin appears to be exceeding the safe yield of this basin based upon the best available scientific information. Thus, there does not appear to be adequate water available to support the development of Coastal Act priority uses or existing undeveloped lots within the USL, let alone new subdivisions outside the USL. [Fn. omitted.] As a result, approval of a 41-lot subdivision outside of the USL would be clearly inconsistent with the priorities for water service established by . . . [the LCP]."

The Commission concluded only that a 41-unit subdivision would be inappropriate. It did not decide that a less intense project could not gain approval.

Moreover, Pratt cites no authority that the denial of a development permit because of insufficient water supply constitutes a taking. Nor does Pratt cite authority that the setting of priorities for water use in the face of an insufficient supply constitutes a taking. Even where the lack of water deprives a parcel owner of all economically beneficial use, it is the lack of water, not a regulation, that causes the harm.

That the Southern California Water Company issued a "can and will serve" letter does not change the results. Pratt cites no authority that the water company's determination is definitive. It is undisputed that there is substantial evidence from which the Commission could conclude the groundwater basin from which the water would come is in overdraft. Pratt has simply failed to demonstrate with sufficient certainty that its proposed 41-unit subdivision will have an adequate supply of water. Without such a demonstration, the extent of the development that can be allowed on its parcel cannot be determined.

Finally, it is undisputed that Pratt has no approval for a wastewater disposal plan from the Regional Water Quality Control Board. It is also undisputed that an approved plan is necessary for development. Pratt fails to explain how the extent of allowed development on his parcel can be determined without such a plan.

Pratt is not entitled to whatever project it desires. Pratt has yet to submit proposals that contemplate a reduction in the size, scope, configuration or density of the project. (See *Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 329.) Pratt claims it has been trying to develop its parcel for 30 years. The claim is demonstrably untrue. This is the only opportunity the Commission has been given to review a development proposal for this parcel. What development plan, if any, the Commission will approve has yet to be determined.

This case is unlike *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* (1999) 526 U.S. 687. There, after five formal decisions and 19 different site plans, a developer brought an action against the city, alleging the city would not permit development of the property under any circumstances. (*Id.* at p. 698.) Here Pratt has presented only one plan to the Commission and the Commission has made only one formal decision. That formal decision does not settle the question of what development will be allowed; nor does it indicate it would be futile for Pratt to submit other development plans.

Pratt's reliance on *Palazzolo* also is misplaced. There the court determined the developer's taking claim was ripe. The state commission's interpretation of its regulations made it clear that no development would be allowed on the wetlands portion of the developer's property. That left only a small upland portion of the parcel available for development. The state had previously accepted that the upland portion

of the parcel was suitable for only one single-family residence and had a value of $200,000. (*Palazzolo v. Rhode Island, supra,* 533 U.S. 606, 621-624.) Here, unlike *Palazzolo,* it is far from determined how much development can occur on Pratt's property.

The judgment is affirmed. Costs on appeal are awarded to respondent.

CERTIFIED FOR PUBLICATION.

GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

E. Jeffrey Burke, Judge
Douglas G. Hilton, Judge
Superior Court County of San Luis Obispo

Manatt, Phelps & Phillips, LLP, Michael M. Berger; William S. Walter for Plaintiff and Appellant.

Edmund G. Brown, Jr., Attorney General, J. Matthew Rodriquez, Senior Assistant Attorney General, John A. Saurenman, Supervising Deputy Attorney General, for Defendant and Respondent.

APPENDIX "B"

SUPERIOR COURT OF CALIFORNIA,
SAN LUIS OBISPO

COUNTY OF SAN LUIS OBISPO

CHARLES A. PRATT CONSTRUCTION CO., INC., a California Corporation Petitioner and Plaintiff, **v.** **CALIFORNIA COASTAL COMMISSION, CALIFORNIA STATE BOARD OF CONTROL, and DOES 1 through 100, inclusive,** Respondents and Defendants.	CASE NO. CV000697 ~~[PROPOSED]~~ **JUDGMENT** (Filed Feb. 9, 2006) Dept: Veterans Memorial Bldg. Judge: Honorable Douglas Hilton Trial Date: August 16, 2004 Action Filed: August 11, 2000

Petitioner and plaintiff Charles A. Pratt Construction (Pratt Construction) filed this action on August 14, 2000. The current operative petition and complaint is the Second Amended Verified Petition for Writ of Mandamus [C.C.P. § 1094.5; Pub. Res. Code § 30801]; or Alternatively, for Writ of Mandate [C.C.P. § 1085]; and Complaint for Damages (hereafter "Second Amended Petition") that states thirteen causes of action. At all proceedings in this matter. William S. Walter, Esq., appeared on behalf of petitioner and plaintiff Charles A. Pratt Construction Co.,

Inc., and Bill Lockyer. Attorney General of the State of California, appeared on behalf of respondents California Coastal Commission and California Board of Control through John A. Saurenman, Supervising Deputy Attorney General.

The court has resolved this matter as follows:

1. On August 21, 2002, the court (Honorable Jeffrey Burke presiding) heard argument on Pratt Construction's tenth, eleventh and twelfth causes of action seeking writs of mandate. On September 23, 2002, the court entered its Ruling on Petition for Writ of Mandate. Attached hereto as Exhibit A is a copy of that ruling which is incorporated by reference herein.

2. On October 22, 2003, the court (Honorable Douglas Hilton presiding) heard argument on the California Coastal Commission's motion for judgment on the pleadings regarding the first through ninth causes of action and the thirteenth cause of action. On November 24, 2003, the court entered its order granting the motion in part and denying it in part. Attached hereto as Exhibit B is a copy of that order which is incorporated by reference herein.

3. On June 30, 2004, the court (Honorable Douglas Hilton presiding) heard argument on the California Coastal Commission's motion for summary adjudication of the seventh and eighth causes of action. On August 30, 2004, the court entered its ruling granting the Commission's motion. Attached hereto as Exhibit C is a copy of that ruling which is incorporated by reference herein.

4. On August 2, 2005, the court (Honorable Douglas Hilton presiding) heard argument on Pratt Construction's Motion That Court Give Due Consideration to Setting Aside Interim Ruling on Summary Adjudication. On October 20, 2005, the court entered its order denying Pratt Construction's motion. Attached hereto as Exhibit D is a copy of that order which is incorporated by reference herein.

5. On October 25, 2005, the court (Honorable Douglas Hilton presiding) heard argument on the California Coastal Commission's motion for judgment on the pleadings regarding the first and second causes of action. On November 29, 2005, the court entered its order granting the Commission's motion without leave to amend. Attached hereto as Exhibit E is a copy of that order which is incorporated by reference herein.

Having resolved all causes of action in this matter, the court enters the following judgment:

IT IS ADJUDGED, ORDERED AND DECREED that:

1. The Second Amended Petition is denied in its entirety and judgment will entered in favor of the California Coastal Commission and against Charles A. Pratt Construction Co., Inc.;

2. Petitioner and plaintiff Charles A. Pratt Construction Co., Inc. is to take nothing by way of its Second Amended Petition;

3. Clerk of the Court shall enter this judgment denying the Second Amended Petition forthwith; and

4. Defendant and Respondent California Coastal Commission is awarded its costs in this matter in the amount of $_____.

IT IS SO ORDERED.

Date: February 9, 2006

/s/ Douglas Hilton
HONORABLE
DOUGLAS HILTON
JUDGE OF THE
SUPERIOR COURT

Approved as to form:

WILLIAM S. WALTER
A PROFESSIONAL CORPORATION

/s/ William S. Walter
WILLIAM S. WALTER

Attorney for Petitioner and Plaintiff
Charles A. Pratt Construction Co., Inc.

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **Charles A. Pratt Construction Co., Inc. v. California Coastal Commission**

No.: **San Luis Obispo Superior Court No. CV000697**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 300 South Spring Street, Suite 1702, Los Angeles, CA 90013.

On January 27, 2006, I served the attached **[PROPOSED] JUDGMENT** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid with the **UPS Overnight courier service** addressed as follows:

William S. Walter, Esq.
679 Monterey Street
San Luis Obispo, CA 93401
Tel: (805) 541-6640

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 27, 2006, at Los Angeles, California.

Sharon Oliver	Sharon Oliver
Declarant	Signature

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN LUIS OBISPO

CHARLES A. PRATT CONSTRUCTION CO., INC. Plaintiff, v. CALIFORNIA COASTAL COMMISSION Defendant.	CASE NO. CV000697 RULING ON MOTION FOR SUMMARY ADJUDICATION (Filed Aug. 30, 2004)

INTRODUCTION

Petitioner Charles A. Pratt Construction Co. ("Pratt") seeks mandamus relief and monetary damages because of the denial of a coastal development permit by respondent California Coastal Commission ("Commission"). The Commission filed a motion for summary adjudication of the seventh cause of action (inverse condemnation) and eighth cause of action (just compensation under fifth amendment) of petitioner's second amended petition. The basis of the motion was that the two causes of action are not ripe for judicial review, and that there is no triable issue of material fact concerning ripeness. At the hearing on the motion on June 30, 2004, the court granted the Commission's motion for summary adjudication, and informed the parties that a written ruling would be prepared.

BACKGROUND

Pratt is attempting to develop Tract 1873 which encompasses approximately 124 acres of land near the entrance to Montana de Oro State Park in Los Osos. Pratt alleges, in it's second amended petition filed June 26, 2003, that a portion of Tract 1873 consists of an area formerly designated as Unit II of Tract 308. Unit II of Tentative Tract 308 was approved in 1973, but various delays and difficulties arose and Unit II was not developed. Pratt subsequently purchased an adjacent 40 acre parcel and submitted a request for approval of a new project that included both the Unit II property and the new 40 acre parcel. After eight years of hearings, studies and evaluations, the County of San Luis Obispo ("County") in 1998 approved development of the property by approving Vesting Tentative Tract 1873. The County's approval was appealed to the Commission which in June, 2000, denied the issuance of a coastal development permit for Tract 1873. In response, Pratt filed a petition for writ of mandamus on August 11, 2000, and ultimately a Second Amended Petition on June 26, 2003.

The Second Amended Petition asserts thirteen causes of action. On September 23, 2002, the court (Judge Burke, presiding) issued an order denying the 10th, 11th, and 12th causes of action for mandamus relief. On June 25, 2003, the court lifted a stay that had been imposed on the remainder of the claims, with the exception of allegations in the first and second causes of action that the Commission's actions

were void because its composition violated the separation of powers doctrine. A further stay was imposed on that issue because it is on review by the California Supreme Court. (*Marine Forests Society v. California Coastal Commission* (2002) 104 Cal.App.4th 1232, *petition for review granted,* April 9, 2003, no. S113466).[1]

On October 22, 2003, the court granted in part and denied in part a motion for judgment on the pleadings filed by the Commission. As a result of this ruling, the following causes of action remained at issue: The seventh cause of action alleging violation of the takings clause under the California Constitution (inverse condemnation); the eighth cause of action alleging violation of the takings clause under the U.S. Constitution (just compensation), and claims set forth in the first and second causes of action which are based on the *Marine Forests* issue. The Commission moved for summary adjudication of the seventh and eighth causes of action on the ground that there is no triable issue of fact with respect to its defense of ripeness.

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[1] The California Supreme Court had not yet rendered an opinion in the *Marine Forests* case when the Commission's present motion for summary adjudication was heard on June 30. 2004.

DISCUSSION

The Issue of Ripeness

The key issues presented in the Commission's motion for summary adjudication are: (1) whether the seventh and eighth causes of action are ripe for judicial review; and (2) whether the futility exception to the ripeness doctrine applies; that is, would it be futile for Pratt to apply for a coastal development permit for a less intense development?

The Commission presented the following facts to show it has not made a final decision on the nature and extent of development that will be allowed on the land encompassed within Tract 1873.

Commission Fact 11: Commission Fact 11 recites a Commission finding[2] that the locally approved project did not minimize habitat disruption and did not adequately minimize residual impacts. However, findings cited by the Commission also state that those deficiencies can be corrected by designing an alternative lot configuration such as the one approved by the Planning Commission. The lot configuration approved by the Planning Commission reduces lot sizes to 10,000 and 20,000 square feet, and limits development to an area below the 600 foot

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[2] The Commission's statement of fact cites the staff report which was included in the administrative record. The staff report is deemed to constitute the Commission's findings. (Cal. Code Regs. Title 14, § 13096(b).)

contour level in order to minimize adverse visual impacts.

Commission Fact 17: On February 15, 2001, the Commission denied Pratt's request for reconsideration. Commission Fact 17, citing the staff report, states that the Commission identified economically reasonable alternatives.

Commission Fact 18: Commission Fact 18 states that after the Commission's denial of the application, Pratt did not take any steps to propose a project that was responsive to the Commission's concerns.

The facts submitted by the Coastal Commission show that it has not made a final determination of the extent of development it will permit on the property; therefore, Pratt's takings claims are not ripe for review.

Pratt contends the case is ripe for review because of the similarity of his situation to that of the landowner in *Palazzolo v. Rhode Island* (2001) 533 U.S. 606. In *Palazzolo* the landowner brought an inverse condemnation action because he was denied the right to fill 18 acres of coastal wetlands within a larger parcel containing an "upland" area. The United States Supreme Court held that the landowner's claim was ripe for adjudication even though it was undisputed the upland portion of the property could be developed and had a value of $200,000. The Court held that although the landowner could not assert a

Lucas claim[3] for a total taking, he was entitled to argue in the lower court that there had been interference with his reasonable investment-backed expectations, thus entitling him to compensation under the holding of *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104.

The Pratt property encompasses approximately 124 acres. Approximately 80% of the property is Environmentally Sensitive Habitat Area ("ESHA") within which little or no development is allowed. Pratt argues that although the non-ESHA portion of his property could be developed, just as the upland portion of the Palazzolo property could be developed, his claim is nevertheless ripe for adjudication under the holding of the U.S. Supreme Court in *Palazzolo.* However, in *Palazzolo* it was stipulated that the portion of the property capable of being developed was worth $200,000; consequently, it was possible to value the landowner's entire property and make a monetary calculation of the extent (if any) to which there had been interference with the owner's reasonable investment-backed expectations. In the present case the nature and extent of development that will be allowed by the Commission in the non-ESHA portion of Pratt's land is not known, and therefore the value of Pratt's property is not known. The Commission has expressly said it will consider development

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[3] A claim that all beneficial use of a property has been taken, entitling the owner to compensation under *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003.

in the non-ESHA portion and has suggested guidelines for such development. Until the extent of permissible development is known, the case is not ripe for adjudication.

The issue of futility

The Final Environmental Impact Report ("FEIR") approved by the County contained a total of ten project alternatives. When the Commission denied Pratt a coastal development permit, it did not identify any of the ten alternatives in the FEIR as an acceptable alternative. The Commission took the position that it should await another application containing the details of a specific project proposal, rather than design a project for the applicant. The staff report recommending denial of Pratt's Motion for Reconsideration observed (at AR 1 1888) that: "There is no requirement in the Coastal Act that the Commission craft conditions that would make a project approvable. . . . In cases, such as this one, where the project would have to be completely redesigned, the Commission will often offer suggestions as part of the denial, but leave it to the Applicant to design a future project."

Pratt argues that continued efforts to develop the property would be futile, citing the failure of the Commission to approve any of the project alternatives contained in the FEIR, Pratt's long history of unsuccessful efforts to develop the property, and existing restrictions against development in Environmentally

Sensitive Habitat Areas which cover approximately 80% of his property. Pratt's contentions raise the questions: "when is enough, enough?" and "when do actions speak louder than words?" At some point in time the repeated denial of reasonable development proposals may become equivalent to a denial of any economic development. However, that point has not yet been reached in this case. The Commission has expressly stated it will consider additional proposals, and has outlined the basic elements of an acceptable proposal. Therefore, the court does not find that the submission of additional proposals would be futile.

Ruling

The Commission's motion for summary adjudication of the seventh and eighth causes of action is granted on the ground that the claims in those causes of action are not ripe for review as shown by the Commission's Facts 11, 17 and 18.

Dated: August 30, 2004

/s/ Douglas Hilton
DOUGLAS HILTON
Judge of the Superior Court

DECLARATION OF SERVICE BY U.P.S. OVERNIGHT

Case Name: **Charles A. Pratt Construction Co., Inc. v. California Coastal Commission**

No.: **CV000697**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 300 South Spring Street, Suite 1702, Los Angeles, CA 90013.

On June 24, 2005, I served the attached **CALIFORNIA COASTAL COMMISSION'S SUPPLEMENTAL OPPOSITION TO MOTION TO VACATE SUMMARY ADJUDICATION RULING** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, with United Parcel Service Overnight Delivery at Los Angeles, California, addressed as follows:

William S. Walter
679 Monterey Street
San Luis Obispo, CA 93401
Telephone: 805.541.6601
Facsimile: 805.541.6640

I declare under penalty of perjury under the laws of the State of California the foregoing is true and

correct and that this declaration was executed on June 24, 2005, at Los Angeles, California.

Sharon Oliver	Sharon Oliver
Declarant	Signature

APPENDIX "C"

Court of Appeal, Second Appellate District,
Div. 6 – No. B190122
S164446

IN THE SUPREME COURT OF CALIFORNIA

En Banc

(Filed Aug. 20, 2008)

CHARLES A. PRATT CONSTRUCTION CO., INC.,
Plaintiff and Appellant,

v.

CALIFORNIA COASTAL COMMISSION,
Defendant and Respondent.

The petition for review is denied.

The request for an order directing depublication of the opinion is denied.

Kennard and Baxter, JJ., are of the opinion the petition should be granted.

GEORGE
Chief Justice

APPENDIX "D"

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT DIVISION SIX

CHARLES A. PRATT CONSTRUCTION CO., INC., Plaintiff and Appellant, v. CALIFORNIA COASTAL COMMISSION, Defendant and Respondent.	2d Civil No. B190122 (Super. Ct. No. CV 000697) (San Luis Obispo County) ORDER MODIFYINNG [sic] OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on May 8, 2008, be modified as follows:

1. On page 10, in the last line, the word "draft" is deleted so the sentence reads: "Pratt cites no authority that the Commission is bound by the findings in the EIR."

2. On page 14, the following two paragraphs are added before the last paragraph, which begins "The judgment is affirmed":

> Pratt complains in its petition for rehearing that we ignored its motions for reconsideration and a new trial. The motions

sought to show that actions taken by the County after the trial court's ripeness ruling preclude development on all but 1,120 square feet of Pratt's parcel. The trial court denied the motions.

We do not consider the motions for the purpose of this appeal because: Pratt raised no points on appeal challenging the trial court's denial of the motions; the material contained in the motions was not before the Commission at the time of its decision; and whatever actions the County may have taken subsequent to the Commission's decision are not relevant to Pratt's action against the Commission. The County is not a party to this action.

There is no change in the judgment.

Appellant's petition for rehearing is denied.

APPENDIX "E"

California Public Resources Code

Section 30240 Environmentally sensitive habitat areas; adjacent developments

(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.

(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.

Section 30600.5 Delegation of authority for issuance of coastal development permits to local governments; exceptions; application, review and appeal procedures; minimum standards; adoption of ordinance

(a) Prior to the certification of a local coastal program and notwithstanding the provisions of subdivision (a) of Section *30519,* after the effective date of this section, the authority for issuance of coastal development permits provided for in Chapter 7 (commencing with Section *30600*) shall be delegated to local governments pursuant to the provisions of this section.

(b) Except for any development specified in subdivision (b) of Section *30519* and Section *30601* or with respect to any development proposed by any state agency, the authority for issuance of coastal development permits provided for in Chapter 7 (commencing with Section *30600*) shall be delegated to the respective local governments within 120 days after (1) the effective date of certification of a land use plan pursuant to Chapter 6 (commencing with Section *30500*) or (2) the effective date of this section, whichever occurs last. This delegation shall only apply with respect to those areas governed by the certified land use plan or a certified portion thereof, applicable to an identifiable geographic area.

(c) Notwithstanding any other provision of this division, after delegation of authority to issue coastal development permits pursuant to subdivision (b), a coastal development permit shall be issued by the respective local government or the commission on appeal, if that local government or the commission on appeal finds that the proposed development is in conformity with the certified land use plan.

(d) Any action taken by a local government on a coastal development permit application pursuant to the provisions of this section may be appealed to the commission pursuant to Section *30602*. The commission shall hear an appeal brought pursuant to the provisions of this section, unless it determines that the local government action taken raises no substantial issue as to conformity with the certified land use plan. For purposes of this subdivision, failure by any

local government to act within any time limit specified in this division shall constitute an "action taken."

(e) The commission shall, following a public hearing and within 90 days after the effective date of this section, adopt minimum standards for public notice, hearing, and appeal procedures to govern local government review of coastal development permit applications pursuant to this section. The standards shall, as nearly as practical, follow the standards required for local agencies after certification of local coastal programs for appealable developments and shall ensure that the notice and hearing required for the coastal development permit can be provided at the same time as the notice and hearing requirements for other local land use decisions which may be necessary for the project requiring the permit. Within 60 days prior to assumption of authority for issuance of coastal development permits pursuant to this section, the local government shall provide drafts of all procedures for issuance of coastal development permits to the executive director of the commission. Delegation of the authority to issue coastal development permits pursuant to subdivision (b) shall not occur until the local government has provided copies of all the adopted procedures for the issuance of coastal development permits to the executive director of the commission. Any amendments to the procedures shall also be furnished to the executive director for his information.

(f) Prior to the delegation of authority to issue coastal development permits as provided in subdivision (b), a local government, after appropriate notice and hearing, shall adopt an ordinance prescribing the procedures to be used in issuing such coastal development permits. Each such ordinance shall incorporate at least the minimum standards for public notice, hearings, and appeals established by the commission pursuant to subdivision (e). In addition, each such ordinance shall contain provisions which prohibit the issuance of a coastal development permit for any development which may conflict with the ordinances which are being prepared to implement the certified land use plan.

(g) In order to expedite certification of complete local coastal programs and the transfer of coastal development controls to local government, the commission shall, on request from a local government, prepare the ordinances necessary for the local government to implement the coastal permit responsibilities of this division.

(h) The time limits set forth in subdivision (b) shall be extended, by right, for not more than 90 days if a local government, by resolution of its governing body, so requests.

(i) The provisions of this section and of any local ordinance enacted pursuant thereto shall have no further force or effect or application after that local government's local coastal program has been certified

and taken effect pursuant to the provisions of this division.

(j) This section shall become inoperative and shall have no force or effect on the date, if any, of a final judicial decision that its provisions are of inconsistent with the requirements of the federal coastal act.

Section 30603 Appeal of actions taken after certification of local program; types of developments; grounds; finality of actions; notification to Commission

(a) After certification of its local coastal program, an action taken by a local government on a coastal development permit application may be appealed to the commission for only the following types of developments:

(1) Developments approved by the local government between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tideline of the sea where there is no beach, whichever is the greater distance.

(2) Developments approved by the local government not included within paragraph (1) that are located on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, or stream, or within 300 feet of the top of the seaward face of any coastal bluff.

(3) Developments approved by the local government not included within paragraph (1) or (2) that are located in a sensitive coastal resource area.

(4) Any development approved by a coastal county that is not designated as the principal permitted use under the zoning ordinance or zoning district map approved pursuant to Chapter 6 (commencing with Section *30500*).

(5) Any development which constitutes a major public works project or a major energy facility.

(b)(1) The grounds for an appeal pursuant to subdivision (a) shall be limited to an allegation that the development does not conform to the standards set forth in the certified local coastal program or the public access policies set forth in this division.

(2) The grounds for an appeal of a denial of a permit pursuant to paragraph (5) of subdivision (a) shall be limited to an allegation that the development conforms to the standards set forth in the certified local coastal program and the public access policies set forth in this division.

(c) Any action described in subdivision (a) shall become final at the close of business on the 10th working day from the date of receipt by the commission of the notice of the local government's final action, unless an appeal is submitted within that time. Regardless of whether an appeal is submitted, the local government's action shall become final if an appeal fee is imposed pursuant to subdivision (d) of

Section *30620* and is not deposited with the commission within the time prescribed.

(d) A local government taking an action on a coastal development permit shall send notification of its final action to the commission by certified mail within seven calendar days from the date of taking the action.